1989

State of Utah v. Onan Ford : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 890272-CA
v.	:	
ONAN FORD,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1978), IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE DAVID E. ROTH, JUDGE, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1978). This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1989).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the trial court properly found that the showup identification procedure was not so suggestive so as to create a substantial likelihood of misidentification?

2. Whether the trial court properly found that defendant was not prejudiced by the uncounseled pretrial contact between defendant and the County Attorney's Office?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 77-35-30(a) (1982):

> (a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

STATEMENT OF THE CASE

Defendant, Onan Ford, was charged with Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1978) (R. 1) Defendant was convicted as charged after a jury trial held on June 29 and 30, 1988, in the Second Judicial District Court, in and for Weber County, State of Utah, the Honorable David E. Roth, Judge, presiding (R. 284, 289). Defendant was sentenced by Judge Roth to a term of not less than five (5) years and which may be for life in the Utah State Prison (R. 289).

STATEMENT OF FACTS

On January 11, 1988 at about 6:00 p.m., a man described as a black male entered the Gas-n-Go convenience store at 110 Patterson Avenue in Ogden, Utah (R. 313, 321-22). The man was about five-feet-eight to nine inches tall, wearing a green jacket, red scarf, grey hat, light brown pants and white tennis shoes (R. 323). His hat was pulled down over his forehead and the scarf pulled up just under the nose (R. 324). John Garcia, the store attendant, observed that the man appeared too "bundled up" for the 40 to 45 degree weather and felt something was wrong (R. 321-22). The man asked Mr. Garcia for the restroom key and walked outside to the restroom door (R. 322). About ten minutes later, he returned, placed the restroom key on the counter, and left the store (R. 322).

A few minutes later, the man re-entered the store, picked up a box of Reynolds Wrap, and placed it on the counter (R. 326). When Mr. Garcia asked if that was everything, the man

pulled a small .22 caliber handgun from his right pocket and said, "Give me all the money you have got." (R. 327). Mr. Garcia responded, "if you want it, go for it" as he opened the cash register and activated a silent alarm (R. 328-30). The man switched the gun to his left hand, reached over the counter, and grabbed all the five, ten, and twenty dollar bills in the register (R. 330). He then exited the store and ran east on Patternson Avenue (R. 331). The Reynolds Wrap box was left on the counter (R. 332).

Mr. Garcia immediately called the Ogden Police Department and gave a description of the robber and the direction of his getaway (R. 332). Officer Tony Huemiller of the Ogden City Police Department was nearby as the police dispatcher described the robber and his escape route on Patterson Avenue (R. 360-61). Officer Huemiller proceeded to the scene, exited his vehicle, and began to look for footprints in the snow which might indicate the robber's path (R. 361-62).

Huemiller observed fresh footprints in the snow going east in an alleyway between Patterson Avenue and 30th street (R. 362). The length of the stride between steps indicated that the person who made the prints was running. Id. Huemiller followed the footprints up the alleyway and across Lincoln Avenue until they went over a fence into a backyard Id. Near the corner of a house, Huemiller found a green jacket, and a hat draped over some bushes (R. 364). Huemiller radioed for another officer to pick up the items and Huemiller continued the pursuit (R. 364).

Huemiller followed the footprints up the sidewalk, across several streets, and through a parking lot (R. 364-65). When the footprints crossed areas where the snow had been cleared or melted, Huemiller would fan out in a circular pattern until he could pick up the footprints again (R. 364-65). The footprints had a distinctive pattern of circles on the treads which appeared to be a tennis shoe pattern (R. 363). Huemiller observed an identical set of prints travelling parallel in the opposite direction Id.

Eventually, the footprints went up a driveway and porch of a house located at 3237 Jefferson Avenue (R. 366-67). Huemiller knocked on the door of the house and a little girl answered (R. 367). The girl said that her father, Richard Jones, lived there, but that her father, mother, and some friends had gone to the store in a light blue vehicle (R. 368). Upon request, the girl gave Huemiller a picture of her father (R. 369).

After some time, a car pulled into the driveway and a black male and black female got out (R. 369). The male's shoe print did not match the footprints. Id. However, a warrant check revealed an outstanding arrest warrant on the male, Edward Lucas, and he was arrested and transported to the Weber County Jail (R. 369).

Soon after, a light blue car drove by with two black male and two black female occupants (R. 369). The car was stopped and the driver was identified as Richard Jones (R. 370). Mr. Jones was advised of his Miranda rights and taken to

Huemiller's vehicle (R. 370). Mr. Jones was wearing tennis shoes, but the pattern did not match the followed footprints (R. 370).

Defendant was in the rear driver's side seat of the stopped vehicle (R. 370, 396). He was wearing brown corduroy pants, a gray jacket, and white Nike tennis shoes (R. 371). The tread pattern on defendant's shoes matched the footprints (R. 371). Defendant was placed in the passenger seat of a police vehicle and advised of his Miranda rights (R. 396). Defendant stated that he understood his rights and agreed to talk to the police (R. 396-97).

Defendant produced a Utah driver's license as identification (R. 397). He was advised that footprints resembling the pattern on his shoes were observed leaving the scene of an aggravated robbery (R. 397). Defendant responded that he had nothing to do with a robbery and that he was with his friends all night Id. He was informed that he was not under arrest and was asked to accompany the officer to the police station to clear up the matter. Id.

Meanwhile, the items discarded in the bush were recovered by the police (R. 414-15). They included a jacket, a hat, and a handgun (R. 406-08, 414). In the left pocket of the jacket, $320.00 in cash was discovered in the following denominations: two $20.00 bills; eleven $10.00 bills; and thirty-four $5.00 bills (R. 406). An unspent .22 cartridge was found in the right jacket pocket (R. 407). An audit of the cash register revealed that approximately $322.00 was missing from the register (R. 333).

The victim, Mr. Garcia, agreed to accompany Officer Gary Peterson to the police station to make a written statement (R. 334). During the statement, Officer Peterson was notified that a suspect was in custody and was present in the police station (R. 410). A showup was quickly arranged and Mr. Garcia was asked if he could identify the robber among three black males who had been placed in an office in the police station (R. 336-37, 410-11). Without hesitation, Mr. Garcia positively identified defendant as the robber (R. 335-39). Defendant was arrested for aggravated robbery (R. 376).

While being booked into the Weber County Jail, the booking officer asked defendant whether, "when [he] was in the store, did [he] think about getting caught and going to prison" (R. 377). Defendant responded, "Yeah, I thought about it." Id. He then paused and blurted out, "while I was laying in bed at home."
Id.

Detective Jerry Smith of the Ogden City Police Department recovered the Reynolds Wrap box which had been left on the store counter and dusted it for finger prints (R. 415). A left thumb print found on the Reynolds Wrap box was compared with defendant's left thumb print and found to be identical (R. 427-28, 432).

James Gaskill, Director of the Crime Laboratory at Weber State College, recovered hair samples from the hat which had been discarded with the jacket and gun (R. 137-38). Mr. Gaskill compared the hair samples with others taken from

defendant and determined that the hair samples taken from the hat were completely consistent with the hair samples from defendant (R. 445). He determined that there was only a one in five-hundred chance that a person other than defendant was the source of the hair sample found in the hat. Id.

Mr. Gaskill also determined that the picture of the suspect's shoe prints in the snow were consistent with the shoes worn by defendant (R. 147-48). He further concluded that less than 15% of the shoes sales in the Ogden area are size ten shoes as shown in the shoe print photograph (R. 455-56).

At trial, defendant's girlfriend, Robin Bailey, testified that she was with defendant all day and night on the day of the robbery (R. 481). However, on cross-examination she admitted that she would do anything to keep defendant out of prison, including lying (R. 494). Richard Jones also testified that defendant was not out of his sight on the night of the robbery (R. 497-98, 515).

SUMMARY OF ARGUMENT

The facts and circumstances of this particular case establish that the showup identification procedure was not so suggestive as to create a substantial likelihood of misidentification. The victim had ample opportunity to view defendant face to face during the crime in a lighted store at the distance of two to three feet. The victim had good reason to pay a high degree of attention to defendant's characteristics and gave a detailed description of defendant to the police. The victim unhesitatingly identified defendant within a matter of two

to three hours after the crime. Finally, defendant was not under arrest at the time of the showup and had waived his right to counsel. Under these circumstances, the statutory lineup requirements were inapplicable and the showup identification was reliable.

Defendant was not denied effective assistance of counsel and his defense was not prejudiced by the uncounseled pretrial contact between he and the County Attorney's Office. The trial prosecutor was shielded from any knowledge or information arising from the allegedly improper contact. Further, the eyewitness and physical evidence was so overwhelmingly incriminating that no substantial likelihood of a different result in the absence of the alleged error exists. Therefore, any error was harmless at best.

POINT I

THE TRIAL COURT PROPERLY FOUND THE SHOWUP INDENTIFICATION EVIDENCE ADMISSIBLE.

Defendant claims that he was subjected to an improper police lineup which did not comply with statutory and constitutional requirements.[1] Because of the claimed irregularities, he requests that the case be reversed and remanded for a new trial and that the victim's eyewitness identification be suppressed. Defendant's claim should be

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[1] As authority, defendant cites Utah Code Ann. § 77-8-2 (1982) and U.S. Constitutional amendment VI in support of his due process claim. (Brief of App. at 16). Because defendant does not cite or argue seperate state constitutional grounds, this court should not consider defendant's claim under the Utah Constitution. See State v. Williams, 107 Utah Adv. Rep. 48, 52 n. 12 (S. Ct. 05/05/89).

rejected.

The facts and circumstances of the present case establish that a showup, not a lineup, was conducted soon after the robbery. As set forth in the statement of facts above, the robbery occurred at a convenience store at about 6:00 p.m. (R. 313, 321-22). Defendant entered the store and asked the attendant, John Garcia, for the restroom key (R. 322). Mr. Garcia noticed that defendant was too "bundled up" for the relatively mild winter weather (R. 321-22). He described defendant as about five-foot-eight or nine inches tall, wearing a green jacket, red scarf, grey hat, light brown pants, and white tennis shoes (R. 323).

About ten minutes later, defendant returned the restroom key and left the store (R. 322). Defendant re-entered the store a few minutes later and picked up a box of Reynolds Wrap and placed it on the counter in front of Mr. Garcia (R. 326). When Mr. Garcia asked defendant if that was everything, defendant pulled a small handgun from his right pocket and said "Give me all the money you have got." (R. 327). Mr. Garcia opened the cash register and said, "if you want it, go for it" (R. 328-30). Defendant reached over the counter towards Mr. Garcia and took the money out of the register (R. 330). Defendant then exited the store (R. 331).

A silent alarm having been activated, the police quickly responded to the scene (R. 329, 403). Officer Gary Peterson arrived at 6:30 P.M. and obtained a detailed description of the robber from Mr. Garcia (R. 403-4). Mr. Garcia accompanied

Officer Peterson to the Ogden City Police Station to give a written statement regarding the crime (R. 839). About twenty to thirty minutes into the statement, Officer Peterson was notified that a suspect was in custody at the police station (R. 410, 839). It was determined that an immediate showup would facilitate the ongoing investigation. Id.

Meanwhile, footprints in the snow had been followed from the scene of the crime and defendant had been taken into custody for further questioning, but was not under arrest (R. 362-67, 397). Defendant was advised of his Miranda rights and agreed to talk to the police (R. 396-97). According to the police, defendant did not at any time request the presence of counsel (R. 818, 826, 830, 834, 841, 851, 853).[2]

Because Mr. Garcia was present in the police station at the time defendant arrived for questioning, the police arranged a showup to determine whether defendant should be further detained (R. 824). Since two other black males had been detained at the same time, the police placed defendant in a room with the other detainees to assume a more accurate identification (R. 825). Mr. Garcia was permitted to view the three black males through a one-way window (R. 375). Mr. Garcia immediately pointed to defendant and said "he is the one." Id. The police did not make any suggestive comments to Mr. Garcia regarding which person to identify (R. 336). The police urged Mr. Garcia to be cautious in his identification to assure accuracy (R. 374). Each detainee

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[2] Defendant testified that he requested counsel every five to ten minutes which testimony was apparently disbelieved by the trial judge (R. 533).

was asked to say, "give me all the money you have got." (R. 338). Again, Mr. Garcia immediately identified defendant's voice as that of the robber (R. 338). At trial, Mr. Garcia testified that he had no hesitation at all in identifying defendant in court as the robber (R. 339).

In determining whether the showup procedure in the present case was proper, a brief review of similar identification cases is helpful. In Stovall v. Denno, 388 U.S. 293 (1967), the United States Supreme Court discussed the due process considerations of out-of-court identifications. In Stovall, a woman had been stabbed 11 times by her assailant. Id. at 295. The defendant was taken to the hospital where the victim had just undergone major surgery to save her life. Id. The defendant was the only black man in the room, was handcuffed, and surrounded by five police officers. Id. From her hospital bed, the victim identified defendant as her assailant. Id. She also made a voice identification. Id. At trial, she made an independent in court identification of defendant. Id.

Applying a totality of the circumstances test, the high court ruled that exigent circumstances justified the suggestive showup. Id. at 302. The need for immediate action made the usual police station lineup procedures impracticable Id. Thus, the defendant's due process rights were not violated Id.

Later, in Neil v. Biggers, 409 U.S. 188, (1972), the United States Supreme Court again addressed the subject of identification procedures. In Biggers, a rape victim viewed her assailant for a considerable amount of time but could only give

police a "general description." Id. at 200. She was shown several photographs (thirty to forty) and picked out a man as having features similar to those of her assailant, but could not positively identify any of the suspects. Id. at 195. Approximately seven months after the commission of the crime, the victim was brought to the police station to view the defendant who was being held on another charge. Id. The police were unable to construct a lineup due to the inability to locate persons who fit the defendant's unusual description. Id. Instead, a showup was conducted which consisted of the defendant walking past the victim and saying "shut up or I'll kill you." Id. The victim positively identified the defendant as the assailant and he was subsequently convicted Id. On appeal, the defendant claimed that the identification and the circumstances surrounding it failed to comport with due process requirements Id at 193.

In rejecting the defendant's due process claim, the court found that the considerable opportunity of the rape victim to view her assailant during the commission of the crime was a substantial factor outweighing the seven month lapse of time between the crime and the showup. Id. at 200-01. The court noted that the victim's record for reliability was good where she had refused to identify numerous other suspects. Id. Weighing all the factors, the court found no substantial likelihood of misidentification. Id.

Likewise, the Utah Supreme Court has permitted showup type identification procedures under a variety of circumstances.

In State v. McGee, 24 Utah 2d 396, 473 P.2d 388 (1970), the Utah Supreme Court held that the rules regarding the right to counsel at identification proceedings were inapplicable to non-lineup confrontations which occurred as a result of an immediate pursuit and apprehension of the suspect within minutes of the crime. Id. at 392. In McGee, the victim arrived at the police station within 15-20 minutes after the suspect was apprehended and the victim positively identified the suspect as the robber. Id. at 390.

In State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972), the Utah Supreme Court recited several factors which should be considered in evaluating the totality of the circumstances surrounding identification procedures: (1) was there justification for the procedure; (2) was there a necessity for using the type of identification employed; (3) were the circumstances of an urgent character; (4) was there a chance that the procedure utilized would lead to misidentification; (5) what opportunity and length of time did the witness have to observe the accused; and (6) how much time has elapsed from the time of the incident to the identification? Id. at 1087. The Wettstein court concluded that the somewhat suggestive photographic display shown to the witness within hours of the incident was not prone to misidentification. Id. at 1087.

The Utah Supreme Court also validated a showup procedure in State v. Allen, 29 Utah 2d 442, 511 P.2d 159 (1973) where two black males tied and bound two women in the back room of a downtown store and robbed them. Id. at 160. The victims

were able to free themselves and call the police. Id. The police arrived quickly and detained two men fitting the description of the assailants just one and one-half blocks away from the crime scene. Id. Within ten to fifteen minutes of the robbery, the police took the victims to where the two suspects were being detained and without any prompting, the victims identified the suspects as the robbers. Id.

The Court explained that it was entirely proper to have the victims observe the men being detained. Id. A prompt showup procedure soon after a crime is committed is preferred. If the person being detained cannot be identified as the assailant, then the detainee may be allowed to proceed on his way. Id. Further, "[a] victim of a robbery should not be denied an opportunity to see the robber until [his or] her memory might fade and thus be less reliable." Id. To view a suspect immediately after the crime enables a victim to be more positive in making a true and correct identification. Id. The "greater the elapse of time, the greater would be the chance for a misidentification." Id. It is thus a safety factor to the innocent to be seen "while the details of dress and features are fresh in the minds [sic] of the victim." Id.

In State v. Ek, 526 P.2d 359 (Utah 1974), the victim of a robbery was shown a picture of the defendant and was permitted to view him in a hospital. Id. at 359. The victim identified the defendant as one of the robbers Id. The Court noted that at the time of the showup, no charge had been filed against the defendant and that the officers were merely attempting to

ascertain who committed the crime. Id. Accordingly, the Court found that the showup procedure was proper to secure the identification of the robber. Id.

Similarly, in State v. Clemons, 580 P.2d 601 (Utah 1978), a rape victim contacted the police soon after the assault. Id. at 602. She described her assailant as black, clean-shaven with a puffy afro hairdo, and wearing a brown leather jacket. Id. The police responded immediately and detained two suspects nearby. Id. The victim was taken to the first detainee where she told police that he was not the man who had assaulted her Id. She was then taken to the other detainee where she positively identified him as the rapist. Id. The Court again upheld the showup procedure as a helpful and accurate method of determining whether a suspect is or is not the perpetrator of the offense. Id.

In State v. McCumber, 622 P.2d 353 (Utah 1980), the Utah Supreme Court further clarified the test to be applied to identification procedures:

> Police identification procedures such as photograph displays, lineups, showups, and the like, do not deny the accused due process of law unless, under a totality of the circumstances, they are so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the accused a fair trial. Where an identification procedure, even though suggestive, does not give rise to a substantial likelihood of misidentification, no due process violation has occurred. In determining the reliability of the identification under the totality of the circumstances, the court must also consider [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness's degree of attention, [3] the

> accuracy of any prior description of the criminal, [4] the level of certainty demonstrated during the identification procedure, [5] and the time between the crime and the identification.

Id. at 357 (numerical designations added). Thus, the five factor McCumber test set forth above must be applied to a totality of the circumstance due process review of an identification procedure.

In State v. Poteet, 692 P.2d 760 (Utah 1984), the Court distinguished between the familiar "lineup" procedures contemplated by Utah Code Ann. § 77-8-1, et seq., and a simple "showup" procedure. Id. at 763. In Poteet, the police officer stood the suspects along a chain link fence and permitted the assault victim to view the suspects. Id. at 763. The victim, who had been badly beaten, identified three suspects as his assailants. Id. In upholding the showup procedure, the court emphasized that the appellant had been advised of his right to counsel and voluntarily varied it prior to the showup. Considering the circumstances surrounding the showup, the court found the identification evidence admissable. Id.

Applying the case law to facts of the present case, the showup evidence was admissible. First, the victim, Mr. Garcia, had ample opportunity to view defendant face to face in a lighted store at the distance of two to three feet (R. 343). The victim viewed defendant as he asked for the restroom key, as he returned the key, as he re-entered the store, and as he pointed a gun at the victim and asked for the money in the cash register (R. 322, 326, 327).

Second, the victim viewed defendant under circumstances which caused the victim to pay a high degree of attention to defendant's dress and features. Third, the victim's description of the robber was detailed and accurate. The victim identified the robber as a black male, five-feet-eight to nine inches tall, wearing a green jacket, red scarf, grey hat, light brown pants, and white tennis shoes (R. 323).

Fourth, the victim's level of certainty during the identification procedure was immediate and without hesitation (R. 375). The victim identified both defendant's features and voice (R. 375, 338). No suggestive comments were made by the police and defendant was given the benefit of having two other black males included in the showup (R. 336, 375, 825).

Finally, the lapse of time between the crime and the showup was brief. The victim called the police at about 6:30 p.m. immediately after the crime (R 332). Officer Huemiller responded, followed the suspects footprints in the snow, and arrived at the suspect's residence within fifteen minutes (R. 360, 362, 391). Within a matter of minutes, defendant and three others were detained when their vehicle approached the residence (R. 369-70). Defendant and Mr. Jones were asked to accompany the officers to the police station for further questioning (R. 371). Soon after arriving at the police station, the showup was conducted and the victim positively identified defendant as the robber (R. 372-75).

Another factor to be considered under the totality of the circumstances is that defendant was informed of his Miranda

rights, acknowledged his understanding, and voluntarily waived those rights prior to the showup (R. 396-97) Contrary to defendant's claim, he did not request an attorney before or during the showup (R. 818, 826, 830, 834, 841, 851, 853). Further, defendant was not under arrest at the time of the showup (R. 397).

Based upon the evidence, the trial court found that the identification procedure was a showup, not a lineup, and that there was nothing to indicate any possibility of misidentification. (Transcript dated June 7th and 8th, 1988 at pp. 9-10). The court explained that simply putting two other individuals with defendant does not make it a lineup. Id. Rather, the additional persons were included for defendant's benefit. Id.

Accordingly, this Court should find that under the totality of the circumstances, the showup identification procedure was not unnecessarily suggestive or conducive to an irreparable mistaken identification. Further, this court should find that the statutory procedures for a formal lineup were inapplicable under the circumstances and that in any event, defendant waived his right to counsel.

POINT II

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S PRE-TRIAL MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT.

Defendant claims that he was denied effective assistance of counsel prior to trial due to prosecutorial misconduct. Specifically, defendant claims that the prosecution

had an improper contact with him, in the absence of his counsel, during a pretrial "sting operation" initiated by defendant and in which defendant cooperated. Defendant's claim should be considered meritless.

Prior to trial, defendant contacted the Weber County Attorney's Office to disclose that he had information regarding a criminal case against his cellmate (R. 547, 552-53). Subsequently, an agreement was reached between defendant and the County Attorney's Office that defendant would cooperate in a "sting operation" designed to recover stolen property in defendant's cellmate's case (R. 285-86)(See Addendum "A", Letter of Agreement). In exchange, the prosecution agreed to take no position on defendant's sentence, to take no position on the gun enhancement charge, to write a letter to the Board of Pardon describing defendant's cooperation, and to do everything in it's power to assure that defendant would serve any possible sentence in a facility other than the Utah State Prison. Id. The agreement was reached without the knowledge of defendant's attorney, Merlin Calver (R. 646-47).

During the "sting operation," defendant made allegedly incriminating statements regarding his case which statements were recorded by police officers monitoring the operation by a body wire placed on defendant (R. 612-14). When defendant later disclosed to his attorney that he had been secretly working with the police and the prosecution, defendant's attorney filed a bar complaint against the prosecuting attorneys involved and withdrew from the case (R. 645).

As a result, defendant moved to dismiss the charges or to recuse the Weber County Attorney's Office (R. 57-58, (28-29). An evidentiary hearing was held prior to trial on defendant's motions. The evidence established that the prosecuting attorney in defendant's case had been shielded from any knowledge of the substance of defendant's allegedly incriminating statements during the sting operation (R. 605, 677-78, 707). Based on this evidence, Judge Roth ruled that defendant's case had not been compromised or prejudiced in any way as a result of the uncounseled sting operation (Transcript of June 7th and 8th 1988 at p. 11). He specifically ruled that defendant had not been denied effective assistance of counsel. Id. Accordingly, he denied defendant's motion to dismiss and motion to recuse and set the matter for trial. Id. at 12.

It is well-established that a defendant must show some degree of demonstrable prejudice in order to successfully argue error based on prosecutorial misconduct. State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988). Rule 30(a) of the Utah Rules of Criminal Procedure provides that any "error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." Utah Code Ann. § 77-35-30(a) (1982). In the absence of showing of prejudice, any error must be deemed harmless. State v. Knight, 734 P.2d 913 (Utah 1987). Error is not harmless if a review of the record persuades the court that without the error there was "a reasonable likelihood of a more favorable result for the defendant. State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984).

In the present case, defendant claims that his attorney, Mr. Calver, was rendered ineffective as a result of the claimed prosecutional misconduct. He does not claim that Mr. Calver acted ineffectively. Nor does he claim that Mr. Calver was precluded somehow in preparing a defense. In fact, Mr. Calver had not entered his appearance until after defendant's preliminary hearing and had simply filed several pre-trial motions which were subsequently pursued by succeeding counsel (R. 645). Defendant simply claims that Mr. Calver was not present during or informed of the sting operation.

Assuming that the contact between defendant and the prosecution was improper, defendant fails to state how the result of his trial would have been different in the absence of the contact. The evidence shows that the prosecutor at trial was shielded from any knowledge or information disclosed in the sting operation (R. 605, 677-78, 707). There is no evidence that defendant was prejudiced in preparing his defense or that his defense was made ineffective. Finally, the eyewitness and physical evidence was so overwhelmingly incriminating that there is no likelihood that the outcome of the trial could have been affected by any pretrial contact between defendant and the prosecution. See State v. Lafferty, 749 P.2d 1239, 1257 (Utah 1988). Accordingly, this court should conclude that the claimed pretrial irregularities were harmless at best.

CONCLUSION

Based upon the foregoing, respondent requests that defendant's conviction be affirmed.

RESPECTFULLY submitted this 31st day of July, 1989.

R. PAUL VAN DAM
Attorney General

DAN R. LARSEN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that four true and accuracte copies of the foregoing brief of respondent were mailed, postage pre-paid, to Robert L. Froerer, Public Defender Assoc., 2568 Washington Blvd., Ogden, Utah 84401, this 31st day of July, 1989.